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OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS
TRANSPORTATION PROJECTS

Review of federal permit conditions

AGENCY: Office of the Federal Coordinator for Alaska Natural
Gas Transportation Projects

ACTION: Notice of Adoption of Final Policy

SUMMARY: The Office of the Federal Coordinator for Alaska
Natural Gas Transportation Projects is adopting a final policy
in order to implement its statutory responsibilities under the
Alaska Natural Gas Pipeline Act (15 U.S.C. 720) with respect
to federal permit conditions imposed on the gas pipeline
project. This policy statement will establish the agency's
procedures for determining whether certain conditions included
in a certificate, right-of-way, permit, lease or other
authorization for an Alaska natural gas transportation project
by federal agencies are prohibited under the Alaska Natural
Gas Pipeline Act.

EFFECTIVE DATE: This policy will be effective immediately
upon publication.

FOR FURTHER INFORMATION CONTACT: Debra Dickson, Director of
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SUPPLEMENTARY INFORMATION:

I. BACKGROUND: Congress enacted the Alaska Natural Gas Pipeline Act in 2004 (15 U.S.C. 720) to encourage construction of a pipeline to deliver natural gas from Alaska's North Slope to the Lower 48 states. The Alaska Natural Gas Pipeline Act establishes a new process for approval and construction of the pipeline, either a project that completes the Alaska Natural Gas Transportation System that President Carter approved in 1977 pursuant to the Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. 719), or a different pipeline project under the Natural Gas Act. The Alaska Natural Gas Pipeline Act of 2004 created the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects and charged the Federal Coordinator, the agency head, with four primary responsibilities: (1) Coordinate the expeditious discharge of all activities by all federal agencies with respect to an Alaska natural gas pipeline; (2) Ensure that all federal agencies comply with the Alaska Natural Gas Pipeline Act; (3) Prohibit federal agencies from imposing permit conditions that would prevent or impair in any significant respect the expeditious construction and operation of the project unless the conditions are required by law; further, the act directs

the Federal Coordinator to determine whether a term or condition would prevent or impair in any significant respect the expeditious construction and operation of the project; and (4) Participate with the state of Alaska in a joint construction surveillance and monitoring agreement.

In addition, Congress transferred to the Federal Coordinator all of the responsibilities and authorities of the Federal Inspector under the Alaska Natural Gas Transportation Act of 1976. These responsibilities will be applicable if the Alaska Natural Gas Transportation System gas line is completed or if the 1980s' prebuilt sections of that project are expanded or modified within the United States to handle Alaska gas.

This policy addresses the third of the four statutory requirements listed above by explaining how the Federal Coordinator will determine whether conditions that federal agencies intend to impose on permits, rights-of-way or other authorizations for an Alaska natural gas transportation project will prevent or impair in any significant respect the expeditious construction and operation of the project.

Several sections of the Alaska Natural Gas Pipeline Act require the Federal Coordinator to consider permit conditions

imposed by federal agencies with respect to the pipeline. Section 106(d)(2), Pub. L. 108-324, 118 Stat. 1255 prohibits agencies from including certain conditions in permits and other approvals, it states:

2) PROHIBITION OF CERTAIN TERMS AND CONDITIONS - No Federal agency may include in any certificate, right-of-way, permit, lease, or other authorization issued to an Alaska natural gas transportation project any term or condition that may be permitted, but is not required, by any applicable law if the Federal Coordinator determines that the term or condition would prevent or impair in any significant respect the expeditious construction and operation, or an expansion, of the Alaska natural gas transportation project.

Thus, the Alaska Natural Gas Pipeline Act of 2004 prohibits conditions that may be included but are not required by any applicable law if the Federal Coordinator determines that the condition would prevent or impair in any significant respect the expeditious construction and operation, or an expansion, of the Alaska natural gas transportation project. The Federal Coordinator's function with regard to some conditions is limited. The Alaska Natural Gas Pipeline Act, Division C, Section 106(d)(4), Pub. L. 108-324 denies the Federal Coordinator any authority to override the Federal Energy Regulatory Commission's implementation of open seasons for the project or the Commission's orders for expansion of the

project under Section 105 of the Alaska Natural Gas Pipeline Act, or to add or impose any terms or conditions to the Federal Energy Regulatory Commission certificate or any agency's permit or other authorization for the project. Division C, Section 106(d) (4), Pub. L. 108-324 states:

(4) LIMITATION- The Federal Coordinator shall not have authority to--
(A) override--
(i) the implementation or enforcement of regulations issued by the Commission under section 103; or
(ii) an order by the Commission to expand the project under section 105; or
(B) impose any terms, conditions, or requirements in addition to those imposed by the Commission or any agency with respect to construction and operation, or an expansion of, the project.

The Alaska Natural Gas Pipeline Act also prohibits federal agencies from amending any previously issued permit or authorization to add conditions determined by the Federal Coordinator to prevent or impair in any significant respect the expeditious construction and operation of the pipeline.

(3) PROHIBITION OF CERTAIN ACTIONS - Unless required by law, no Federal agency shall add to, amend, or abrogate any certificate, right-of-way, permit, lease, or other authorization issued to an Alaska natural gas transportation project if the Federal Coordinator determines that the action would prevent or impair in any significant respect the expeditious construction and operation, or an

expansion, of the Alaska natural gas transportation project. ANGPA §106(d)(3).

The prohibition of permit conditions that would prevent or impair expeditious construction and operation does not apply to conditions adopted by state agencies, even those issued pursuant to programs encouraged or funded by the federal government. However, if a state-issued permit includes a condition which is incorporated into a federal permit by a federal agency, the Federal Coordinator may review the condition that the federal agency adopted. Any determination the Federal Coordinator makes would not affect the state condition, just the applicability of the federal permit condition.

II. DISCUSSION OF THE FINAL POLICY:

The Office of the Federal Coordinator is implementing these provisions of the Alaska Natural Gas Pipeline Act of 2004 by policy, establishing the process by which the Federal Coordinator will exercise its responsibility to determine whether permit conditions would prevent or impair expeditious construction of the project. This policy will apply to the agency's review of conditions initially included in an authorization for an Alaska natural gas transportation project, as well as any renewal or reissuance of authorizations.

One commenter suggested that the policy include a statement of the legal authority on which it is based. We have expanded the introduction to the policy to include this information.

A. INTENTION TO WORK WITH OTHER AGENCIES:

It is the Federal Coordinator's intention to work closely with other federal agencies before, during and after the National Environmental Policy Act process and during the permit application review process of each agency in order to identify the likely need for permit conditions early and to determine as soon as possible whether a particular permit condition would be consistent with the Alaska Natural Gas Pipeline Act's statutory prohibition. The Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects expects that through coordination with other federal agencies and the permit applicant, it should be able to resolve concerns about most terms and conditions early and either avoid a formal review process or conclude it expeditiously.

B. DEFINITIONS:

(1) CONDITION: The agency proposes to define term or condition of the Alaska Natural Gas Pipeline Act, Section 106(d) (2), Pub. L. 108-324, 118 Stat. 1255 – referred to in this policy as condition – to mean any obligation not proposed by the applicant but proposed to be added to the permit or

authorization by a federal agency. That includes all terms, stipulations or conditions required by the agency and any other requirement imposed by a federal agency. It excludes any obligation included by the applicant in its application, even if the obligation is suggested by an agency.

One commenter suggested that Federal Coordinator should not exclude from its review terms or conditions suggested by or agreed to by the project applicant, stating that the project applicant may not have the same interest as the United States in expeditious completion of the gas pipeline. The Office of the Federal Coordinator believes it is highly unlikely that an applicant will not want expeditious construction of the project. Besides, if the applicant and an agency mutually agree on a particular term or condition, and that term or condition is part of the application, it could not be considered as imposed by an agency on a project authorization. The Office of the Federal Coordinator's review only relates to permit conditions imposed by federal agencies.

(2) AUTHORIZATION: The Federal Coordinator is defining the term authorization to mean any certificate, right-of-way, permit, lease, approval or other authorization required in order to construct or operate an Alaska natural gas transportation project, but excludes permissions for useful, but not required authorizations. Accordingly, federal loan

guarantees, licenses for communications equipment not necessary for the project and other such permissions would not be subject to Federal Coordinator review.

One commenter believed the proposed policy was too narrow because it used the term "permit" to include any permit, right-of-way or other authorization. It was the Office of the Federal Coordinator's intention to include any kind of authorization in its review, not only permits. To clarify this, we are changing the policy to define the term "authorization" and defining that term to encompass any permit, right-of-way, lease or other authorization required for an Alaska natural gas transportation project.

One commenter suggested that authorizations which would assist but are not essential for an Alaska natural gas transportation project should nonetheless be subject to review. The Federal Coordinator disagrees. Congress granted the Federal Coordinator limited authority to review permit conditions that might prevent or delay expeditious construction and operation of the project. If an authorization is not required for the project, any condition imposed on that authorization is unlikely to prevent or delay expeditious construction or operation of the project.

(3) ALASKA NATURAL GAS TRANSPORTATION PROJECT: The agency does not intend to propose a definition of Alaska natural gas transportation project, as that term is defined in the Alaska Natural Gas Pipeline Act, Section 102 of Pub. L. 108-324, 118 Stat. 1255. It is important to note that the definition includes the entire system, not simply the pipeline.

Therefore, this permit review policy will cover conditions addressing support facilities, compressor stations, the gas treatment plant and other parts of the project.

(4) PREVENT OR IMPAIR IN ANY SIGNIFICANT RESPECT THE EXPEDITIOUS CONSTRUCTION AND OPERATION OF THE PROJECT:

As discussed in the proposal, the agency did not define "prevent or impair in any significant respect the expeditious construction and operation of the project" because the agency believes this should be interpreted based on the circumstances of the project at the time of an agency's action, the agency's intention and justification in crafting the proposed condition, and the condition's effect on the project. Prevent or impair in any significant respect cannot be well defined in the absence of specific circumstances. As an example, a condition that causes a significant delay in the first in-service date contractually agreed to between the pipeline owner and/or operator and a shipper could, if extreme, be deemed to impair expeditious construction and operation of the project.

However, such a determination could only be made if the contractual in-service date were reasonable in light of the complexity of the project and other circumstances.

C. PROCESS FOR REVIEW OF PERMIT CONDITIONS:

The Federal Coordinator does not intend to review every condition on every permit. Rather, the agency will generally review permit conditions at the request of the applicant or permittee. In addition, the Office of the Federal Coordinator reserves the right to select conditions for review on its own initiative. When the permitting agency's practice or regulations allow that agency or the Office of the Federal Coordinator to share a draft permit condition with an applicant, the Office of the Federal Coordinator will work with the applicant and the agency as early as possible to identify problematic permit conditions. An applicant may request review of a permit condition by the Office of the Federal Coordinator prior to issuance if the applicant believes it may prevent or impair in any significant respect the expeditious construction and operation of the project.

If the practice of the permitting agency does not allow draft permit conditions to be shared with an applicant, the permittee will have to wait to request review of a permit condition until after the permit is issued.

One commenter suggested that the policy include a procedure for federal agencies other than the Federal Coordinator to request a review of proposed conditions before issuing a project authorization. The Federal Coordinator has not adopted this suggestion. The Office of the Federal Coordinator will work with other agencies during the permitting process. If an agency chooses to share possible permit conditions with the Office of the Federal Coordinator in advance of issuing its permit, the office will provide guidance on how to avoid problems. It is not the Federal Coordinator's intention to provide a formal review before issuance. However, if an early formal determination is sought, the Federal Coordinator will make every effort to provide effective guidance to an agency.

Requests from the applicant or the permittee for review of permit conditions should specify what specific condition will prevent or impair expeditious construction and operation of the project and should explain why the condition will have a detrimental impact on the project.

D. INFORMATION REQUIRED FOR REVIEW:

The Office of the Federal Coordinator will need background information from the agency in order to conduct its review, including:

- (1) The language of the specific condition.
- (2) A citation to the legal requirement for the condition.
- (3) Any analysis the agency has prepared of the cost of implementing the condition.
- (4) Any other information that explains the agency's reasons to include the condition, especially the circumstances that require its inclusion. This should include any discussion of the benefits of the conditions, or a cost-benefit analysis if one has been prepared.
- (5) If the permit has not been issued, a statement addressing whether it is permissible under the agency's practice to share the draft condition with the applicant.

The Office of the Federal Coordinator expects this information should be readily available from the agency and will not impose a burden on the agency, as the agency should have already documented the need for the condition as part of the administrative record. Accordingly, the Office of the Federal Coordinator anticipates that the agency will be able to provide this information within ten (10) calendar days of

Office of the Federal Coordinator's notification of a review and request for additional information.

One commenter suggested that the Federal Coordinator reserve the right to deny an application for review due to a lack of adequate information, if it is frivolous, or for any other cause. If the request for review is incomplete, does not demonstrate merit or otherwise does not provide a basis for relief, the Federal Coordinator does not need supplemental reasons for denying relief.

Based on Office of the Federal Coordinator's review of the proposed condition, the Federal Coordinator will determine whether the condition would prevent or impair in any significant respect the expeditious construction and operation of the project. In most cases, the Office of the Federal Coordinator's review should be completed in less than thirty (30) days after a project applicant requests a review. The Federal Coordinator will provide notice of its decision and reasoning to the applicant and the agency. If the Federal Coordinator determines that the condition or proposed condition would prevent or impair in any significant respect the expeditious construction and operation of the project, the Office of the Federal Coordinator will facilitate a meeting

between the permittee or applicant and the issuing agency and, if appropriate, other experts, in order to help resolve the issue.

A commenter suggested including a statement to the effect that the permit condition review policy was intended to reduce litigation and that it did not create any legal rights. The Office of the Federal Coordinator disagrees with such an addition to this policy. If the Federal Coordinator determines that a permit condition will prevent or impair expeditious construction of the project, that determination creates the right for the applicant to seek a judicial ruling that the condition is unenforceable if it is not required by law. Accordingly, the Federal Coordinator will not adopt this suggestion.

III. FINAL POLICY FOR REVIEW OF FEDERAL PERMIT CONDITIONS FOR AN ALASKA NATURAL GAS TRANSPORTATION PROJECT

The purpose of this policy is to explain how the Office of the Federal Coordinator will exercise its responsibilities with respect to review of permit conditions under Section 106(d) of the Alaska Natural Gas Pipeline Act (15 U.S.C. 720(d)(d)). Section 106(a) of the Alaska Natural Gas Pipeline Act (15

U.S.C. 720(d)(a) established the Office of the Federal Coordinator as an independent office in the executive branch. The Federal Coordinator also exercises authorities under the Alaska Natural Gas Transportation Act (15 U.S.C. 719), and this policy is adopted in order to implement those responsibilities as well. This policy applies to the issuance of initial permits, as well as the renewal or reissuance of permits for an Alaska natural gas transportation project.

It is the Federal Coordinator's intention to work closely with other federal agencies before, during and after the National Environmental Policy Act process for an Alaska natural gas pipeline project and also during the permit application review process of each agency in order to identify early the likely need for permit conditions and to determine as soon as possible whether a particular permit condition would be precluded by the Alaska Natural Gas Pipeline Act's statutory prohibition. The Federal Coordinator expects that through coordination with other federal agencies and the permit applicant, it should be able to resolve concerns about most terms and conditions early on and either avoid a formal review process or conclude it expeditiously.

1. Definitions:

(a) Term or condition in Section 106(d)(2) of the Alaska Natural Gas Pipeline Act – referred to in this policy as condition – means any obligation not proposed by the applicant but proposed to be added to the permit or authorization by a federal agency. This includes all terms, stipulations, conditions or additions to the application and any other requirement imposed by an agency. It excludes any obligation included by the applicant in its application, even if the obligation is suggested by an agency.

(b) Authorization means certificate, right-of-way, permit, lease or any other authorization required in order to construct or operate an Alaska natural gas transportation project.

2. Review of Proposed Terms or Conditions

(a) Review of permit conditions by request of applicant

(1) An applicant for any authorization or a permittee for any authorization for an Alaska natural gas transportation project may request the Federal Coordinator to review any condition included in or proposed for inclusion in the authorization.

(2) Such requests must be made to the Federal Coordinator no later than 30 days after issuance.

(3) The request shall include a specific identification of each condition which the applicant or permittee believes is inconsistent with the Alaska Natural Gas Pipeline Act and an

explanation of the basis of that belief, including information that supports the contention that the permit condition would prevent or impair in any significant respect the expeditious construction and operation of the project.

(4) The Federal Coordinator may review a permit condition even if the permittee has not requested review.

(b) Materials necessary for review

If the Federal Coordinator receives a request for review of any condition, the Federal Coordinator will notify the issuing agency of the request. The Federal Coordinator will need the following information from the agency:

(1) The language of the specific condition.

(2) A citation to the legal requirement for the condition.

(3) Any analysis the agency has prepared of the cost of implementing the condition.

(4) Any other information that explains the agency's reasons to include the condition, especially the circumstances that require its inclusion. This should include any discussion of the benefits of the conditions, or a cost-benefit analysis if one has been prepared.

(5) If the permit has not yet been issued, a statement addressing whether agency practice or regulations would allow the Office of the Federal Coordinator to discuss the proposed condition with the applicant.

(c) Permit condition review

In determining whether a proposed permit condition would prevent or impair expeditious construction and operation of the project, the Federal Coordinator will consider:

(1) Any delays in project construction and operation caused by the condition.

(2) All other available information, including, if available, the project's cost of meeting the condition.

(3) The statutory and regulatory basis for the condition, as provided by the issuing agency.

(4) The views of the applicant.

(d) The Federal Coordinator will endeavor to complete its review within 30 days after a request from an applicant or permittee.

(e) The Federal Coordinator's decision

(1) The Federal Coordinator will determine whether the proposed condition would prevent or impair in any significant respect the expeditious construction and operation of an Alaska natural gas transportation project or expansion of that project. The Federal Coordinator's decision will be sent to the agency and the applicant or permittee.

(2) If the Federal Coordinator determines that the condition or proposed condition would prevent or impair in any significant respect the expeditious construction and operation

of the project, the Federal Coordinator will facilitate a meeting between the permittee or applicant and the issuing agency and, if appropriate, other experts, in order to help resolve the issue.

Dated: May 18, 2012

Larry Persily

Federal Coordinator

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